Supreme Court, U.S.
FILED
JAN 16 2001
OFFICE OF THE CLERK

No. 00-863

In The

Supreme Court of the United States

FRANKLIN J. DAY, M.D.,

Petitioner,

vs.

SUPERIOR COURT, THE STATE OF CALIFORNIA, SAN FRANCISCO COUNTY,

Respondent.

DIVISION OF MEDICAL QUALITY OF THE MEDICAL BOARD OF CALIFORNIA,

Real Party in Interest.

On Petition For Writ Of Certiorari To The State Of California, First Appellate District

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN T. SCHREIBER
Counsel of Record
LAW OFFICES OF JOHN T. SCHREIBER
961 Ygnacio Valley Road
Walnut Creek, California 94596
(925) 938-2460

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. This Court, not a lower court, determines whether an important issue is present when it grants certiorari 2

II. The issue of what comprises the exercise of independent judgment on the entire administrative record for purposes of effective judicial review and due process is especially critical here, where the trial court opened ***only five of the twenty-two*** volumes of transcripts of the administrative hearing, not where the trial court may have inadvertently skipped over a line or page here or there in reviewing the entire record. 2

III. The issue at stake regarding Business & Professions Code § 2337 is whether the statute satisfies equal protection concerns without any articulated, legitimate state purpose for its 1995 amendment, when no other profession whose judicial review is governed by CCP 1094.5 is so treated 6

IV. Real Party's assertion that Petitioner was subject to discipline for his civil practice but not his Navy practice is precisely the service-connected test this Court rejected in *Solorio* 8

V. Real Party's own accusations show that Petitioner was disciplined for matters not alleged against him in writing 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bail Bonds by Marvin Nelson, Inc. v. CIR, 820 F.2d 1543 (9th Cir. 1987) 4

Bixby v. Pierno, 4 Cal.3d 130, 93 Cal.Rptr. 234, 481 P.2d 242 (1971) 3, 6

Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953) 8

Cleveland Chiropractic College v. State Board of Chiropractic Examiners, 17 Cal.App.3d 25 (1971) 6

Conn v. Gabbert, 526 U.S. 286, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999) 7

Drummey v. State Bd. of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848 (1939) 3

Eastern Associated Coal Corp. v. United Mine Workers of America, ___ U.S. ___, 121 S.Ct. 462 (2000) 2

Glover v. United States, ___ U.S. ___, 2001 WL 15331 (January 9, 2001) 2

Home Placement Service v. Providence Journal Co., 819 F.2d 1199 & fn.4 (1st Cir. 1987) 4

Huffman v. Lundquist, 51 Cal.2d 465 (1951) 5

In re Demergian, 48 Cal.3d 284 (1989) 7

In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) 1, 10

Kenneally v. Medical Board, 27 Cal.App.4th 489, 32 Cal.Rptr.2d 504 (1994) 6, 7, 8

Lacy v. California Unemployment Ins. Appeals Bd., 17 Cal.App.3d 1128 (1971) 5, 6

TABLE OF AUTHORITIES – Continued

Page

Landau v. Superior Court, 81 Cal.App.4th 191 (1998) ...6, 7

Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936).....1, 3, 4, 5

O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)..... 8

Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct.1217, 113 L.Ed.2d 190 (1991) 3

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) 7

St. Joseph's Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed.1033 (1936) 3

Solorio v. United States, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987)..... 1, 8, 9

Townsend v. Gray Line Bus Co., 767 F.2d 11 (1st Cir. 1985)..... 4

Zand v. CIRService, 143 F.3d 1393 (11th Cir. 1998) 4

STATUTES

United States

Federal Rule of Civil Procedure 63..... 4

10 U.S.C. § 1094..... 8

California

Business & Professions Code § 2337 ..... 1, 6, 7

Code of Civil Procedure § 1094.5 .....6, 7

§ 1094.5(c)..... 6

INTRODUCTION

Far from the trivial light in which Real Party attempts to portray this issue (Does a trial court have to read every line of every page of a 22-day long administrative hearing), Real Party's Opposition underlines the following questions: What did this Court mean in *Morgan v. United States*, 298 U.S. 468, 481, 56 S.Ct. 906, 80 L.Ed. 1288 (1936) when it stated that "The one who decides must hear"? What comprises sufficient exercise of the trial court's independent judgment over the facts before it? These questions raise matters of constitutional import applying not only to the parties in this case, but to administrative matters in federal and state courts across this country, and in other kinds of cases as well. What the trial court did in this case was analogous to a trial court deciding a case without hearing all the evidence. Fed.R.Civ.P. 63 illustrates how federal courts address this issue and in doing so, reveals a split among circuits as to whether the rule arises from constitutional principles of due process or simply matters of policy. This Court's language in *Morgan* suggests the former, but the lack of consensus among the circuits reflects a further need for this Court's guidance.

Real Party's arguments regarding Business & Professions Code § 2337, *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987) and that Petitioner was sufficiently notified of the basis for which he was disciplined also fail. Petitioner was disciplined for conduct that simply never appeared in writing. That ruling conflicts with this Court's holding in *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). For all of these reasons, this Court should grant certiorari.

I. This Court, not a lower court, determines whether an important issue is present when it grants certiorari.

Real Party presumes that the 1st District's denial of publication of its opinion stating that "the key to our decision is the distinction between reading and reviewing" (App. 7) is determinative of whether an important federal question is at stake in this Petition. This Court is not constrained by lower court decisions regarding publication. Lack of publication does not mean that the issue is not important. This Court has granted certiorari in a number of cases in which the lower court opinion was unpublished. In this term alone this Court granted certiorari in *Eastern Associated Coal Corp. v. United Mine Workers of America*, ___U.S.___, 121 S.Ct. 462 (2000) and *Glover v. United States* ___ U.S. ___, 2001 WL 15331 (January 9, 2001), though the lower court's opinion was unpublished.

II. The issue of what comprises the exercise of independent judgment on the entire administrative record for purposes of effective judicial review and due process is especially critical here, where the trial court opened *only five of the twenty-two* volumes of transcripts of the administrative hearing, not where the trial court may have inadvertently skipped over a line or page here or there in reviewing the entire record.

The question here does not necessarily involve whether the trial judge skipped the occasional line or page in reviewing the entire administrative record, as Real Party attempts to portray, but whether review of *less than a quarter* of those transcripts (Vols. 1, 5, 7, 8, 16, a total of 5 out of 22) and checking the cites to the trial brief (Appendix Exh. "M," ¶¶ 6-9, Exh. "B" thereto, Appendix Exh. "U," 3:13-27) (a claim belied by the fact that many of the transcripts for those cites were still sealed) comports with concepts of judicial review and due process.

This Court in *Morgan* stated that "The one who decides must hear." *Morgan, supra,* 298 U.S. at 481. *Bixby v. Pierno,* 4 Cal.3d 130, 93 Cal.Rptr. 234, 481 P.2d 242 (1971) relied on *St. Joseph's Stock Yards Co. v. United States,* 298 U.S. 38, 49-52, 56 S.Ct. 720, 80 L.Ed. 1033 (1936) in the course of holding that judicial review in the administrative context where a fundamental or vested right is at stake means that the trial court must exercise its independent judgment over the entire administrative record. *Bixby, supra,* 4 Cal.3d at 138-139 & fn. 4, 143-144 & fn. 10. Real Party cites *Drummey v. State Bd. of Funeral Directors,* 13 Cal.2d 75, 87 P.2d 848 (1939) for the proposition that the petitioner bears the burden of convincing the court that the administrative decision is not supported by the weight of the evidence. *Drummey, supra,* 13 Cal.2d at 85. *Drummey* relies on *St. Joseph's Stock Yards* in so holding. *Drummey, supra,* 13 Cal.2d at 85. However, *Drummey also states* that:

> After considering the various possibilities, we can see no escape from the conclusion that in such a proceeding the court to which the application for mandate is made must weigh the evidence, and *exercise its independent judgment on the facts,* as well as on the law, if the complaining party is to be accorded his constitutional rights under the state and federal Constitutions.

Drummey, supra, 13 Cal.2d at 84(italics added). Nothing in *Drummey,* let alone *St. Joseph's Stock Yards,* states that independent judgment on the facts takes place from reviewing less than 25% of the testimony of an administrative hearing in which factual issues such as credibility and conflicting expert testimony were so critical. This Court should make clear that the presumption of validity of administrative findings does *not* mean that the trial court, as a trier of fact, need not examine all of the evidence before it. The trial court in this context acts as a trier of fact, not in an appellate capacity. See *Salve Regina College v. Russell,* 499 U.S. 225, 231-233, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). The result that Real Party would have

this Court leave standing would clash with the long-established requirement from *Morgan* that "The one who decides must hear." *Morgan, supra,* 298 U.S. at 481. That result would also conflict with the numerous federal and other state administrative authorities that require judicial review of the entire administrative record.

Real Party utterly fails to address those authorities (set forth at pp. 12-17 of the Petition in this case) in its opposition, other than to mention that Fed.R.Civ.P. 63 does not apply. What the trial court did here was akin to a trial court deciding a case without hearing all the evidence. Rule 63 shows how federal courts handle that situation and that the result Real Party wishes would conflict with the many state and federal cases interpreting Rule 63 and its state court equivalents. Rule 63 and the case law interpreting it also illustrates the conflict among the circuits as to whether the rationale behind Rule 63 is based on federal constitutional concerns, as the 1st, 9th and 11th Circuits hold, or whether that rationale derives from non-constitutionally-based policy concerns.[1] This Court can and should make clear that the rationale behind Rule 63 derives from constitutional concerns of due process.

Real Party claims that the attachment to Petitioner's trial court petition of transcript excerpts rendered a review of all the transcripts unnecessary (Opp. at 22-23). However, Petitioner was in a position in which he had to prove a negative (Appendix Exh. "E," 4:23-5:5).

Many of the allegations sustained against Petitioner focused on his teaching his non-malignant chronic pain patients to self-inject themselves with medication through an epidural catheter (Appendix, Exhs. "A-1"-"I,"

---

[1] *Home Placement Service v. Providence Journal Co.*, 819 F.2d 1199, 1202 & fn. 4 (1st Cir. 1987) (citing *Townsend v. Gray Line Bus Co.*, 767 F.2d 11, 18 (1st Cir. 1985)); *Bail Bonds by Marvin Nelson, Inc. v. CIR*, 820 F.2d 1543, 1547 (9th Cir. 1987) (relying on *Townsend, supra*); *Zand v. CIRService*, 143 F.3d 1393, 1400 (11th Cir. 1998) (relying on *Townsend, supra*). Other Circuits do not discuss the basis for this rule.

9:12-10:16, 35:24-36:9, 47:25-48:7). The trial court, in adopting verbatim the ALJ's findings, ruled that "while this risk is well-recognized when allowing terminal cancer patients to self-inject, it would not be acceptable for non-cancer patients. ALJ Lew called this a straight benefit/risk approach. For chronic non-malignant pain, the risk clearly outweighs the benefits." (App. 33). However, even Real Party's counsel conceded that Real Party experts Drs. Levin and Eisele never testified that "a patient should never be allowed to self-inject except in situations with cancer." (Vol. 17, 19:8-18). Without expert testimony there could be no finding that Petitioner's performance fell below his professional standard of care. *Huffman v. Lundquist*, 51 Cal.2d 465, 473 (1951). The only way for the trial court to find the lack of support for this point was to review the entire record.

When the ALJ rejected Petitioner's parallel to diabetic self-injections as not analogous (App. 33-34), the ALJ stated that such injections are intramuscular and not into the epidural space. However, the only statements in the record on that issue were made by Real Party's counsel, not by its experts (Vol. 17, 21:24-22:8). The way for the trial court to verify this instead of relying solely on the product of Real Party's word processor was to look at the record, which it did not do. Volume 17 was among the sealed transcripts (Appendix Exh. "M," ¶¶ 6-9, Exh. "B" thereto).

Nor did the fact that documentary evidence was before the trial court, as asserted by Real Party (App. 8), change that obligation. In such circumstances "[i]t is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order." *Morgan, supra*, 298 U.S. at 481.

The authorities Real Party cites to support its position that such a review is unnecessary do not support Real Party's position. In *Lacy v. California Unemployment Ins. Appeals Bd.*, 17 Cal.App.3d 1128 (1971), the court stated the general rule that "the superior court exercises its independent judgment on the evidence and inquires

whether the administrative agency's findings are supported by the weight of the evidence." *Lacy*, 17 Cal.App.3d at 1132. The *Lacy* court said nothing about whether reading every page of every line was unnecessary. Id. The court in *Lacy* also made no mention of *Bixby*, issued almost three and one-half months earlier. *Bixby v. Pierno*, 4 Cal.3d 130 (1971).

Nor did the court in *Cleveland Chiropractic College v. State Board of Chiropractic Examiners*, 17 Cal.App.3d 25 (1971) so hold. *Cleveland Chiro* cites California Code of Civil Procedure § 1094.5(c), which requires review of the whole record. Id at 35. *Cleveland Chiro* predated *Bixby* by over five months.[2]

III. The issue at stake regarding Business & Professions Code § 2337 is whether the statute satisfies equal protection concerns without any articulated, legitimate state purpose for its 1995 amendment, when no other profession whose judicial review is governed by CCP § 1094.5 is so treated.

Real party cites *Landau v. Superior Court*, 81 Cal.App.4th 191 (1998) (App. 208-259), which upheld B & P Code § 2337, and *Kenneally v. Medical Board*, 27 Cal.App.4th 489, 32 Cal.Rptr.2d 504 (1994) to show that California and federal equal protection issues are analyzed similarly and to show that the rational basis scrutiny applies in this case.

Real Party missed the point here. The primary point is that the legislative history of the 1995 amendment to B

---

[2] That C[illegible]*land Chiro* did not address *Bixby* is clear from the earlier case's description of the trial court's duty in cases governed by the substantial evidence test needing only to review the evidence supporting the administrative decision. *Cleveland Chiro, supra*, 17 Cal.App.3d at 36. *Bixby* held that even in cases in which the trial court applies the substantial evidence test, it does so by looking at the entire administrative record. *Bixby, supra*, 4 Cal.3d at 143-144, fn. 10.

& P § 2337 contained no indication or statement as to what the legislative purpose was of this amendment, which is required even if rational basis is the test. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16 (1973). That is a more stringent requirement than that used by California's courts. *In re Demergian*, 48 Cal.3d 284, 292 (1989) ("A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it."). Real Party made no effort to address this point. Instead, Real Party focused extensively on why equal protection analysis of B & P § 2337 is governed by the rational basis test.

The list Real Party provides of other instances in which writ review is the exclusive means of appellate review also misses the point. Real Party compares apples to oranges. None of those examples involve trial court review of administrative decisions pursuant to CCP § 1094.5. The disparate and suspect treatment of doctors pursuant to B & P § 2337 as opposed to all others *subject to judicial review by CCP § 1094.5* is the relevant comparison. The question is whether the statute rationally furthered an articulated state purpose. *Rodriguez*. The answer here is "no."

The two written decisions Real Party refers to in arguing why B & P § 2337 does not unduly burden physicians seeking appellate review presume that the trial court properly exercised their responsibilities. That meant properly exercising its independent judgment on the entire administrative record. Opening *five of twenty-two* volumes of the administrative transcripts, as the photographs showed and as the trial court conceded (Appendix Exh. "M," ¶¶ 6-9, Exh. "B" thereto; Appendix Exh. "U," 3:13-27) does not suffice.[3]

---

[3] Real Party cannot truly believe that *Kenneally* and *Landau* override this Court's recent holding in *Conn v. Gabbert*, 526 U.S. 286, 291, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999) of one's liberty

IV. Real Party's assertion that Petitioner was subject to discipline for his civil practice but not his Navy practice is precisely the service-connected test this Court rejected in *Solorio*.

Real Party's assertion that Petitioner subjected himself to Real Party's jurisdiction by obtaining a California license to practice medicine and by practicing away from the Naval base raises the very distinction used by this Court in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) before this Court rejected it in *Solorio*: that the military's jurisdiction over its personnel for disciplinary purposes depends on whether that personnel was engaged in service-connected activities. There is no reason to overturn this Court's holding in *Solorio*.

The military's need to control its readiness as per Congress' intent was especially pertinent here and carries practical effects. As this Court stated in *Solorio*: "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Burns v. Wilson*, 346 U.S. 137, 140, 73 S.Ct. 1045, 1048, 97 L.Ed. 1508 (1953) (plurality opinion) (footnote omitted). *Solorio, supra*, 483 U.S. at 440 (emphasis added).

In December 1990 Petitioner was called to active duty because of Operation Desert Storm (See Appendix Exh. "GG," Admin. Exh. 21). Under Real Party's view, Real Party could have disciplined a physician on active duty for conduct that took place while that doctor was on reserve status, thus depriving the military of a needed physician during combat. See 10 U.S.C. § 1094. As this Court in *Solorio* also stated: " 'judicial deference . . . is at

---

interest to practice one's profession. Even the Court in *Kenneally* did not so hold. *Kenneally, supra*, 27 Cal.App.4th at 498, fn. 8.

its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged (citations omitted). . . . ' " *Solorio, supra,* 483 U.S. at 447-448.[4]

V. Real Party's own accusations show that Petitioner was disciplined for matters not alleged against him in writing.

Real Party argues that it made sufficient written accusations as the basis for disciplining Petitioner for "allow[ing] A.C.'s minor son to be responsible for administering Narcan in a syringe to her if needed." (App. at 187-188). Real Party makes much ado about the specificity of the language in the Second Supplemental Accusation and how it put Petitioner on notice (Opp. at 27). However, they do not quote those allegations themselves and for good reason: The allegations do not state what Real Party claims that they do.

Paragraph 32 of the Second Supplemental Accusation alleges in pertinent part that: ". . . . She was discharged feeling better and was provided with Narcan, in a syringe and without indicating the amount, which was given to her 'attendant' son" (Opp. App. at 63).

Paragraph 49K states in pertinent part that: ". . . . In fact, *the patient* repeatedly demonstrated her control of

---

[4] Real Party's citation of the Statement of Decision to argue that Petitioner did not show that the Navy cleared him is disingenuous. The Statement of Decision quotes Volume XXII, 12:18-15:22 of the Administrative Hearing Reporter's Transcript (App. at 95). That particular part of the transcript reflects argument, not testimony (Volume XXII, 12:18-15:22). Volume 22, of course, was one of the sealed transcripts (Appendix Exh. "M," ¶¶ 6-9). Had the trial court actually read the transcript it would have known this, instead of relying on Real Party's word processor without independently verifying the accuracy of this citation to the record.

the treatment regimen, as noted hereinabove, even to the extent that she was provided Narcan, in a syringe, to take home with her to *self administer*, without any notation as to the amount, and which was given to her 'attendant' son. (See paragraph 32 hereinabove). . . . " (Opp. App. at 75 (emphasis added)).

Far more than the son's age was missing from these accusations. Absolutely nothing in these accusations informed Petitioner that giving the Narcan to the son for the *son* to administer to his mother was a basis for the disciplinary proceedings against Petitioner. Real Party points to Petitioner's testimony. However, discipline imposed from Petitioner's testimony without any notice from the accusation is precisely what this Court in *In re Ruffalo*, 390 U.S. 544, 550-551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) sought to avoid. Imposing that discipline without a written, accusatory basis violated Petitioner's right to due process. This Court has the opportunity to make that clear.

CONCLUSION

For all of the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Dated: January 16, 2000

Respectfully submitted,

JOHN T. SCHREIBER
LAW OFFICES OF JOHN T. SCHREIBER
Counsel of Record for Petitioner